

**IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)**

Case no. **205/2020**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THUSO MASILO

Plaintiff

and

MINISTER OF POLICE

First Defendant

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Second Defendant

CORAM: DE KOCK, AJ

HEARD ON: 16, 17 and 19 AUGUST 2022

JUDGMENT BY: DE KOCK, AJ

DELIVERED: This Judgment was handed down electronically and by circulation to the parties' representatives by e-mail and released to SAFLII. The date and time for hand down is deemed to be 11h00 on 19 September 2022

INTRODUCTION:

[1] The Plaintiff issued summons against the First Defendant based on his alleged unlawful arrest and detention. The Plaintiff further issued summons against the First and Second Defendants based on his alleged claim of malicious prosecution. The First and Second Defendants filed a Plea. In terms of the Plea the Defendants relied on Section 40(1)(b) of the Criminal Procedure Act 51 of 1977, claiming that the arresting officer Ndaba held a reasonable belief/suspicion that the Plaintiff had committed a Schedule 1 offence in order to justify the Plaintiff's arrest and detention. It was further pleaded that the members of the SAPS lawfully detained the Plaintiff in terms of Section 39(2) and (3) of the Criminal Procedure Act up until his release. In respect of the Plaintiff's second claim, save for pleading that the Plaintiff was suspected of committing a Schedule 1 offence, the Defendants pleaded a bare denial.

[2] At the beginning of the action Counsel for the Plaintiff and the First and Second Defendants placed the following common cause facts on record:

- 2.1 The identity of the Plaintiff;
- 2.2 Jurisdiction of the Court;
- 2.3 That the Plaintiff was arrested on the 3rd of August 2017 without a warrant of arrest;
- 2.4 That the members of the South African Police Service were acting in their employment as employees of the First Defendant;

2.5 That the Plaintiff has complied with the provisions of Section 3 of Act 40 of 2002;

2.6 That the Plaintiff was prosecuted for murder and on 13 August 2019 the Plaintiff was acquitted in terms of Section 174 of the Criminal Procedure Act of 2002;

2.7 The Plaintiff was detained until 13 August 2019.

[3] Counsel for the Plaintiff and the First and Second Defendants place the following issues on record that are in dispute:

3.1 Whether the arrest and detention were unlawful;

3.2 Whether the proceedings instituted by the members of the Defendants were malicious;

3.3 Whether the prosecution was indeed malicious.

[4] Furthermore the liability of the First and Second Defendants and quantum of the damages suffered by the Plaintiff is evenly in dispute.

[5] The parties agreed that the onus of proof rest on the First Defendant in regard to the claim of unlawful arrest and detention and that the onus of proof rests on the Plaintiff in relation to the Plaintiff's claim for damages due to the alleged malicious prosecution.

[5.1] The parties legal representatives filed heads of argument on 22nd, 24th and 26th of August 2022, whereafter judgement was reserved.

EVIDENCE:

The Plaintiff's evidence:

[6] Two witnesses testified on behalf of the Plaintiff's case. The Plaintiff himself as well as one Mr Thabiso Motaung.

Evidence by the Plaintiff:

[7] The Plaintiff testified that he issued summons for unlawful arrest and detention and malicious prosecution. The Plaintiff testified that he was arrested on the 3rd of August 2017. The Plaintiff testified that on the 3rd of August 2017 at 5 o'clock in the morning the police arrived at his residence whilst he was still sleeping. He testified that four police officers arrived in two vehicles. He further testified that after the police knocked, he opened the door.

[8] He testified that the police came there to tell him that they are arresting him for murder. He testified that the police did not want him to talk and did not ask for his name. He was not told who the deceased was at his place of residence but only at the police station. He was dragged by two police officers on the right-hand side and the left-hand side to the van. He testified that he did not know why they dragged him because he was not aggressive. He testified that he was handcuffed in the front and with him in the vehicle which was a double cab was another person.

[9] The police vehicles drove around the location with other people being arrested. The police had a list according to which they were arresting members of the community. At the police station he testified that he was informed that he was arrested for murder and nothing further was explained to him. He testified that in the police van he asked the police for what he was arrested for and that the police said that he must not ask many questions. He testified that at the police station the arrested persons were separated and that they were placed directly in the cells. A day passed and the following day he was called and charged. He testified on the first day no fingerprints were taken.

[10] He confirmed that he was charged with murder. Relating to the circumstances of the murder, the Plaintiff testified that his friend was fighting with the deceased. His friend's name was Tseka Tshabalala ("Tseka"). On 28 or 29 July 2017 a few days before the arrest Tseka was fighting the deceased. He testified that what prompted Tseka was that his brother was fighting with the deceased and Tseka intervened. This all transpired at a tavern. He testified that the deceased ran away and at that stage Tseka's brother was already injured.

[11] Tseka's brother's friends chased the deceased. He testified that he and Tseka then left the shebeen and proceeded to Tseka's parental place to report what transpired. After they explained at Tseka's parents' house they proceeded to the location where the deceased was residing. They proceeded to look for Vusi who was also in the car chasing. Before they came to the deceased's place of residence they came across a lot of people. They did not see the deceased when they arrived there. The group of people pointed where the deceased lay. The deceased was lying on the ground inside the path where people used to walk. Tseka proceeded to the deceased and stabbed him.

[12] He testified that he grabbed Tseka and told him that the deceased's person was already injured. At that stage the deceased was still alive. He testified that he grabbed Tseka but that Tseka broke free and stabbed the deceased. He then went again to Tseka, grabbed him and spoke to him. They then left the scene. He testified that the reason why Tseka stabbed the deceased was because of the quarrel with his brother. He testified that he did not know why the deceased was lying on the ground but that he later learned that the deceased was lying on the ground because the group of people already injured him.

[13] He testified that he did not injure or assault the deceased person. He testified that he told the latter events to the police. He indicated that the police told him that he will tell his story to the Court. He testified that he was then detained at the police station. On 5 August, two (2) days later he was taken to Court. He testified that his

Legal Aid attorney said that he must apply to Court for bail. He testified that he was not given an opportunity to apply for bail. He testified he went back to Court approximately fourteen (14) days later and that the matter was still postponed with no bail application. He testified that he struggled to get bail for nine (9) months.

[14] He testified that after nine (9) months he was informed that bail was denied. He testified that the Magistrate at Court told him that bail was not granted. He further testified that the case was remanded for investigation two (2) months after he was denied bail. The matter was transferred to the Regional Court. For a period of almost a year the matter was in the District Court. At the Regional Court the matter was postponed for further investigation.

[15] He testified that the matter then proceeded to criminal trial. His first appearance was approximately two (2) years later. He testified that at the criminal trial there was a witness Thabiso Mokoena who testified for the State. He testified that he heard Mokoena's evidence. He testified that Mokoena explained that he did nothing that he was the one reprimanding Tseka and not the one who stabbed the deceased. He testified that he then came to the decision that he was not guilty. He further testified that the prosecutor did not withdraw the charges. On 13 August 2019 he was acquitted. He was detained from the 3rd of August 2017 up until 13 August 2019. He testified that no one gave him an opportunity to tell his side.

[16] He testified that at the police station where he was kept – he was kept in a separate cell for two (2) days where there was no water and electricity and a shortage of blankets. When he was transferred to Harrismith prison, he did not have his own cell. There were approximately twenty (20) inmates in one cell. He endured this for approximately two (2) years. He testified that he was not comfortable with the circumstances and that his mother passed on and he could not attend the funeral because he was incarcerated.

[17] He further testified that he could not continue to do his odd jobs and enhance

his living.

[18] During cross-examination the Plaintiff was referred to page 16 of Bundle C and referred to the fact that the matter was remanded to the 17th of January 2018 for a further bail application due to time constraints and the Plaintiff was further referred to page 22 of Exhibit “C” dated 26 February 2018 in terms whereof it is noted that bail for Accused no. 1, 2 and 3 were refused.

[19] It was put to the Plaintiff on behalf of the First Defendant that the First Defendant would present evidence that the Plaintiff was arrested based upon the affidavit of Thabiso Motaung wherein it was allegedly stated that the Plaintiff was identified as a person who assaulted the deceased. The Plaintiff's counsel raised an objection that the affidavit does not state the aforesaid version and I accordingly upheld the objection.

[20] It was put to the Plaintiff on behalf of the Second Defendant that there was a link to the crime and that they formed a strong *prima facie* opinion that the Plaintiff committed this crime. No further detail was however given, and no link was explained.

[21] During re-examination the Plaintiff confirmed that he was not arrested for assault on intimidation.

Second witness on behalf of the Plaintiff: Thabiso Motaung:

[22] He testified that he knows the Plaintiff and that they stay in the same village. He further testified that he knew that the Plaintiff was arrested on the 3rd of August 2017 and that the complaint was about murder. He further testified that he testified for the State in the criminal trial as he was a witness to the murder. He testified that the deceased person stabbed Vusi and that Vusi told the witness the latter.

[23] He testified that he saw a group of people that were on a Ford Bantam chasing the deceased. He testified this happened around 2 o'clock in the morning. He

testified that there was a group of people and from the group of people he could identify Tseka Oupa and the Plaintiff. He testified that in the process Tseka drew out a knife and stabbed the deceased. He testified that the Plaintiff reprimanded Tseka. Tseka then broke loose from the group and stabbed the deceased in the back. He testified that the Plaintiff took Tseka away and they went home. He testified that he did see the Plaintiff but that he did not see the Plaintiff assault the deceased. He only saw the Plaintiff pulling Tseka away.

[24] He testified that he told Ndaba a police officer (CID) who wears casual clothes what happened and that he explained to the police officer that the Plaintiff was trying to reprimand Tseka. He testified that he did not tell Ndaba that the Plaintiff assaulted the deceased. He testified that he explained who killed the deceased and that he testified that he saw Tseka opening an Okapi knife in the process. He testified that he made a statement when the Plaintiff was arrested. He testified that when he went to Court he spoke to the prosecutor at Court. He testified that he told the prosecutor that he observed a Ford Bantam with lights on. He testified that there was a group of people. He indicated to the State prosecutor that he observed the deceased lying down and shaking. He testified that he informed the prosecutor that in the process Tseka drew out a knife whilst the Plaintiff tried to reprimand him. In the process Tseka stabbed the deceased in his back.

[25] He testified that he did not tell the prosecutor that the Plaintiff assaulted or murdered the deceased. He further testified that after speaking to the prosecutor he was informed to come to Court. A month later he came back to Court. He testified that the Court asked him to tell what he observed on the scene. He testified that he told the Magistrate what transpired. He told the Magistrate that Vusi came and told him that he was stabbed. In the process a group of people exited the tavern and chased the deceased. When the group of people aligned from the bakkie the deceased was lying on the ground. Thereafter Tseka, Thuso and Oupa arrived.

[26] He testified that he informed the Court that Tseka stabbed the deceased and

that the Plaintiff reprimanded Tseka. He specifically testified that from the Plaintiff's arrest he told Ndaba, the State Prosecutor and the Court the same story and identified the person who stabbed the deceased. He testified that he spoke two (2) to three (3) times to the prosecutor and three (3) times to the police.

[27] During cross-examination the witness was asked whether he made a statement to the police where to he answered that did make a statement after Plaintiff and others were arrested. During cross-examination the witness was referred to page 73 of Bundle 3, a statement deposed to by the witness. The witness was pointed to the date of 2017/07/29 and paragraph 2 of his affidavit which contains the same date. The witness could however not indicate if he made the statement on the same day that the incident took place. On the Court's questions he indicated that the incident took place on the Saturday but that he did not make a statement on this day. He was further referred to the affidavit that he testified in examination in chief that was dated the 2nd of August 2017. It was indicated to the witness that the warning statement for the Plaintiff was dated the 3rd of August 2017. The witness testified that he remembers that he made the statement and that he was not forced to make the statement and that he made the statement voluntarily.

[28] The witness testified that he confirms paragraph 3 and 4 of the statement which reads as follows:

"I saw that a group of people who left the tavern assaulting the deceased. Out of the group I could only recognize Mr Oupa and Mr Thuso because I know them and know where they stay. After the assault on the deceased, I then saw Mr Tseka taking a knife out of his pocket and he went to the deceased and stabbed him whilst he was lying down, he then went back again stabbing him and the deceased was lying on the floor. I recognized Mr Tseka because I know him and I also know where he is staying."

[29] During cross-examination the witness was asked why he did not tell Mr.

Ndaba that only Mr Tseka told him that he must keep whatever he saw to himself, otherwise he will see what happens to him. The witness answered that Mr Ndaba informed him that he will get into trouble if he makes statements that exonerated the Plaintiff. During re-examination he testified that Mr Ndaba said that he must also say that the Plaintiff was involved.

[30] The only version put to Mr Motloun by the Defendants was that members of the First Defendant arrested the Plaintiff based upon the statement of Mr Motloun. No version of the Second Defendant was put to Mr Motloun. It was not disputed that Mr Motaung on numerous occasions informed members of the First and Second Defendants of the non-involvement of the Plaintiff in the death of the deceased.

[31] After the two witnesses the Plaintiff proceeded to close its case. An application for absolution from the instance was made. I dismissed the application for absolution from the instance.

Evidence on behalf of the Defendant's case:

[32] The Defendant called three witnesses.

Evidence of Sergeant Ndaba:

[33] He testified that he currently holds the rank of Sergeant. During the year of 29 July 2017, he held the rank of Constable, and he was stationed at Phuthaditjhaba. He testified that on the 29th of July 2017 he was called to attend to a scene where a deceased person was lying next to the road. He noticed that the deceased had stabbed wounds. He asked members of the community in the vicinity if they could provide any information relating to the events which led to the death of the deceased. Nobody knew what happened. He was only informed that there was some incident at a nearby tavern which led to the deceased's death.

[33.1] Later the morning he went to Zillie's Tavern. He enquired if anyone

could provide information. He testified that a person known as Thabiso Motaung volunteered to assist him. Mr Ndaba testified that Mr Motaung informed him that the deceased had a quarrel with the brother of Tseka and that the deceased hit the brother with a bottle. Mr Ndaba testified that Mr Motaung also informed him that the deceased then left the tavern, a group of people chased the deceased, some were in a “*bakkie*” and Mr Motaung joined the group. Mr Ndaba testified that Mr Motaung further informed him that when Mr Motaung got to the industrial area the deceased was lying on the ground being assaulted by a group of people and the deceased was on the floor. Mr Ndaba testified that Mr Motaung then informed him that Mr Motaung could identify Thuso and Oupa and saw that Tseka stabbed the deceased.

[33.2] Mr Ndaba asked if Mr Motaung could assist with the addresses of the suspects. Mr Ndaba stated that Mr Motaung said he would but also said he did not want others to see him assisting the police. Mr Ndaba testified that Mr Motaung informed him that on the day following the incident the suspects told him not to disclose any information. Mr Ndaba asked Mr Motaung to come to the police station to make a statement. Mr Ndaba stated that the statement that Mr Motaung made was dated the 29th of July 2017. After Mr Motaung made his statement, he asked Mr Motaung if he could show him where the suspects reside. Mr Motaung took him back to the tavern and arranged that Sergeant Ndaba would return to take Mr Motaung to point the places of residence.

[34] He testified that on the 3 August 2017 he fetched Mr Motaung to show the addresses. At first nothing was mentioned of any discussions between him and Mr Motaung on the 2nd of August 2017. Upon a leading question being posed he testified that Mr Motaung made a second statement on 2 August 2017. He testified that he went to Mr Motaung’s residence and took Mr Motaung to the police station. He required a second statement as Mr Motaung’s first statement had insufficient detail. He wrote the statement as Mr Motaung gave the information.

[35] In the second statement the witness read paragraphs 3 and 4. Mr Ndaba in his own words explained that Mr Motaung saw a group of people chasing the deceased and Mr Motaung saw a group of people assaulting the deceased. He testified that the information was volunteered by Mr Motaung and that he did not add anything as he at that stage had no information as to the events or suspects. Mr Ndaba explained in his own words with reference to paragraph 4 of the statement that Mr Motaung out of the group of people assaulting the deceased identified Thuso and Oupa and saw Tseka stabbing the deceased.

[36] Upon being questioned as to what went through his mind whilst reading the statement, he testified that a person was murdered, and he wanted to establish who did it. He stated that if a witness says persons 1, 2 and 3 were assaulting another and one of them stabbed that person he would then have to arrest the suspects based on common purpose. He further testified that he is not a medical expert, and he did not know who killed the deceased and that fingers point to the group of people. It appeared to him that the suspects are known. He testified that in some instances suspects who committed crimes run away. Hence, he took Mr Motaung the following morning to show the suspects' addresses where they reside. He testified that he went early in the morning to increase the possibility of an arrest.

[37] On the morning of the 3rd of August 2022 he went to the Plaintiff's residence. He found the Plaintiff's mother in the kitchen and introduced himself as a police official. The Plaintiff's mother went to wake the Plaintiff who was sleeping. He identified himself as a police officer and informed the Plaintiff that he was arrested for murder. He then informed the Plaintiff of his rights and placed the Plaintiff in the police vehicle. He testified that it is a police officer's duty not to decide if a suspect is guilty or not. He simply looks at the evidence and leaves the rest for the Court. He formed the view that the Plaintiff was part of the group that assaulted the deceased and that he must arrest him.

[38] After arresting the Plaintiff and the other suspects he proceeded to the police

station. He testified that he issued each person with their rights. He further testified that when he arrested the suspects, they did not dispute that they were involved in the assault they just kept quiet. Mr Ndaba testified that he must arrest a suspect because if you interview them, they sometimes run away. He conceded that he only conducted an interview with the Plaintiff at the holding cells after his arrest. Mr Ndaba was questioned as to the process of arrest, when arrest may be effected and whether he applied his discretion. Mr Ndaba responded that if a complaint is made, a police officer must arrest. He did not have any other discretion as suspects sometimes run away. Mr Ndaba conceded that he could not provide any alternatives other than arrest. Mr Ndaba testified that he did not apply for a warrant because it sometimes takes time and sometimes suspects run away.

[39] In cross-examination Mr Ndaba was referred to the statement dated 29 July 2017, which did not identify any suspects, other than the driver of the bakkie. Mr Ndaba replied by stating that he confused the events. It was put to Mr Ndaba that he could not have discussed any suspects or any pointing of addresses and hear anything of any intimidation as it would not yet have occurred, Mr Ndaba conceded that he had no information of any suspects on the 29th of July 2017. In cross-examination Sergeant Ndaba was confronted with Mr Motaung's version that the second statement dated the 2nd of August 2017 was in fact only taken on the 3rd of August 2017 after the Plaintiff's arrest. Sergeant Ndaba was referred to the investigation diary wherein the statement was only recorded on the 3rd of August 2017. It was further pointed out that there were duplicate entries in the case dockets for annexures "A10" being a notice of rights, and a second "A10" being Motaung's second statement. Mr Ndaba stated that it was an administrative error and that Mr Motaung's statement was only recorded as an entry the next day because Mr Ndaba had other duties. It was further in cross-examination put to Sergeant Ndaba that paragraph 4 of Motaung's second statement does not state that Thuso and Oupa assaulted the deceased but only that they were identified as part of a group that was present. It was further pointed out that the statement specifically identified Tseka as the person who was stabbed.

[40] At this stage Sergeant Ndaba became argumentative whilst presenting his evidence. Sergeant Ndaba could not identify any specific act of assault from the statement of Mr Motaung.

[41] During cross-examination Sergeant Ndaba confirmed that the Plaintiff did give an explanation at the holding cells which he did not consider as being important and failed to record the Plaintiff's explanation anywhere in the docket. He testified that he left the further process to his colleagues and went to his office to complete paperwork.

[42] Sergeant Ndaba testified that he opposed the Plaintiff's bail because there might be other suspects and the community was waiting for him. Sergeant Ndaba was referred to the bail information form where he opposed the bail. He confirmed that the Plaintiff had a fixed address, that he was easy to trace, that he did not evade arrest, that he was cooperative with the police, that he was no danger to the community and that he will not interfere with the witnesses, but still proceeded to oppose bail. He further conceded that he knew that based upon his recommendation to oppose bail that the Plaintiff could be incarcerated. Mr Ndaba could not remember if he informed the prosecutor that the Plaintiff denied his involvement, he answered that they discussed a lot of things. Mr Ndaba conceded that in the two-year period which passed no other information what obtained save for what was in the docket.

Evidence of Mr Goodman Makanya:

[43] He testified that during the time of the incident he was the Regional Court Control Prosecutor at Phuthaditjhaba Magistrate's Court. He was the responsible person in charge of deciding whether matters were to be transferred from the District Court to the Regional Court. He testified that there was also a District Court Control Prosecutor involved in matters in the District Court where the Plaintiff's case was pending for plus minus a year, when numerous postponements occurred and where the bail application was eventually heard after approximately seven (7) months, before being transferred to the Regional Court. He testified that his duties included reading the

docket from the District Court and assisting with guidance of the investigating officer. His decision to continue with the prosecution was based solely upon the statement of Mr Motaung. He confirmed that no further evidence was presented in the almost two (2) years duration of the criminal trial that could link the Plaintiff to the alleged offences. The witness attempted to explain the reason for the long delays and protracted bail application and trial. In the latter regard he referred to the notes of the presiding Magistrate.

[44] He decided to proceed with the prosecution based upon the statement of Mr Motaung on a provisional charge of murder only. He initially testified that the Plaintiff was charged for additional offences of robbery and intimidation but later conceded that this was incorrect. He apparently only consulted with Mr Motaung after approximately eight (8) months after prosecution was initialized and after a bail application was opposed by the Defendant. He testified that he gave instructions to the investigating officer and the prosecutor to oppose bail.

[45] In his evidence he stated that all the perpetrators got into a van. Some assaulted, some stabbed and some were part of the group. He stated that the Plaintiff was identified as part of a gang implicated in murder and robbery the prosecution was to proceed. He could not state who of the group fell in which of these categories and placed reliance on the affidavit of Mr Motaung. It was pointed out that Mr Motaung states in paragraph 4 that out of the group he could only identify the Plaintiff and Oupa and that he saw Tseka stabbing the deceased and that no mention was made of any specific act of assault wherein the Plaintiff was identified other than being part of the group. He however insisted that the only interpretation is that the Plaintiff was part of the group who assaulted, despite him not being able to state who fell into which of the alleged identified categories.

[46] In cross-examination he confirmed that he reads the docket, makes entries and provides instructions to the investigating officer. He does not consult. Only upon being questioned he then changed his version to state that he did indeed consult the

investigating officer and the State's only witness. He did however not make any notes of the alleged consultations. Mr Makanya was asked whether Sergeant Ndaba informed him of the Plaintiff's version that the Plaintiff was involved in the offence. He stated that he could not recall but that it would not have made any difference as he would not consider it in reaching a decision to prosecute, because he had a witness who implicated the Plaintiff. Mr Mutyaba's only entry in the docket wherein a consultation with the witness was requested on the 23rd of April 2018, almost eight (8) months after the arrest and after the bail application. When requested as to the delay Mr Mutyaba testified that due to his workload he could not consult before. Mr Mutyaba could therefore not dispute Motaung's version that he informed the prosecutor from the inception that the Plaintiff was not involved in the alleged assault and/or murder.

The next witness Mrs Maponya:

[47] She testified that she was a Regional Court Prosecutor involved in the criminal trial. She confirmed that she was not involved in the District Court or bail proceedings. No evidence has been presented from the Defendants from any prosecutor involved in the District Court. She testified that she received a docket from the Control Prosecutor Mr Mutyaba on 16 May 2018. She read the docket and satisfied herself with the content. She formed a *prima facie* view to place the matter on the roll. She testified that when she was satisfied that there was a *prima facie* case then she places the matter on the roll. The matter is then placed on the roll and postponed for a consultation. She testified that she did consult with the witness in this matter Thabiso. She consulted with Mr Motaung by reading his statement in English. She then interpreted the statement in Sotho to him and then gave him the statement to read himself. Mr Motaung apparently confirmed the correctness thereof.

[48] Later in cross-examination she testified a new version that apparently Mr Motaung saw the Plaintiff kicking the deceased. This was the first mention of any witness of any specific assault of the Plaintiff on the deceased throughout the trial never put to the Plaintiff's witnesses. When questioned she was informed by Sergeant Ndaba

of the Plaintiff's statement that he was not involved in the offence, she replied that she was not and that it would not have made a difference if she were as, it would not have influenced her decision to proceed with the prosecution. She further testified that Mr Motaung's evidence in Court deviated from his statement. He testified about the incident but in relation to the Plaintiff that he only saw the Plaintiff in the group but did not testify that the Plaintiff was involved in any assault. She further testified that she did not consider declaring Mr Motaung a hostile witness and confirmed her submissions to the Criminal Court as per the record of the Section 174 proceedings that the State did not oppose the discharge as there was no evidence linking the Plaintiff to the murder other than the fact that he was present as part of the group. She further confirmed that Tseka was convicted of murder on the evidence of Mr Motaung. She further testified that the charges were not withdrawn after Mr Motaung's evidence that the Plaintiff was not involved.

APPLICABLE LEGAL PRECEDENT:

[49] *National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 199* it was stated that:

"Where there are two stories mutually destructive before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false."

[50] In terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 a peace officer may without a warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody.

[51] In *Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A)* it was stated that an arrest constitutes an interference with the liberty of the individual concerned and it therefore seems to be fair and just to require that the person

who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.

[52] In *Ngema v Minister of Police 2012 (05081/2011) ZAGPJHC 104* at para [6] it was held that:

*“It is trite that the onus rests on the arresting officer and therefore the defendant who proves justification for the arrest and detention (see: *Zeeland v Minister of Justice and Constitutional Development and Another 2008 (4) SA 458 (CC)* at para [24] and [25]. The termination of this issue requires me to assess the credibility of the witnesses.”*

[53] In *Motsei v Minister of Police, in re: Phefadu v Minister of Police (6524/12) [2014] ZAGPPHC 567 (23 May 2014)*, it was held that:

“[6] **ARREST AND DETENTION:**

6.1 Section 40 of the Criminal Procedure Act 51 of 1977 provides the list of offences where police officers may arrest offenders without a warrant. It states that a peace officer must entertain a suspicion that the arrestee committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds. The rationale for the stringent approach is that in most claims for damages at common law for wrongful arrest the Courts have always adjudicated upon the requirement for such claim that the defendant acted without reasonable and probable cause for effecting the arrest. There are a myriad judicial, academic and media reports about the public disquiet on the abuse by some peace officers of the provisions of Section 14(1) because they arrest persons merely because they have ‘the right’ to do so but where under the circumstances an arrest is neither objectively nor subjectively justified.

6.2 The liberty of an individual is constitutionally enshrined in the right of freedom and security Section 12 of the Constitution of the Republic of South

Africa Act 108 of 1996. This point was restated by Bertelsman J in Louw v Minister of Safety and Security 2006 (2) SACR 178 (T) 186 a – 187 e that an arrest is a drastic measure invading a personal liberty and it must be justifiable according to the demands of the Bill of Rights. “[Police] are obliged to consider in each case when a charge has been laid for which suspect might be arrested whether there are no less invasive options to bring the suspect before the Court that an immediate detention of the person concerned. “The Constitution does not espouse a dispensation of arbitrary deprivation of freedom of movement and security. The Court authoritatively cited the case of Mhaga v Minister of Safety and Security 2001 (2) All SA 534 (Tk), where the Court held that in a case where a police officer had arrested and detained a person once the arrest and detention is admitted the onus of proving the lawfulness thereof rest on the State.

6.3 *Arrest and detention is prima facie wrongful and unlawful and is there for the defendant to allege and prove lawfulness of the arrest or detention.*

See: *Brand v Minister of Justice 1959 (4) SA 712 (A) at 714.*

Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 587 to 589

Minister van Wet & Orde v Matshoba 1990 (1) SA 280 (A)

Stambolie v Commission of Police 1919 (2) SA 369 (25C)

Lombo v African National Congress [2002] 3 All SA 577 (SCA); 2002 (5) SA 668 (SCA) at para [32]”

[54] *In Minister of Safety and Security v Sekhoto and Another [2011] 2 All SA 157 (SCA) at para [28] Harms, DP held:*

“Discretion:

[28] *Once the jurisdictional facts for an arrest whether in terms of Section 40(1) or in terms of Section 43 are present a discretion arises. The question whether there are any constraints on the exercise of discretion powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the constitution. In other words once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasized, is not obliged to effect an arrest. This was made clear by this Court in relation to Section 43 in Groenewald v The Minister of Justice.*"

[55] In *State v Lubaxa* 2001 (2) SACR 703 (SCA) at para [19] it was held that:

"Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognized by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A) at 135 C – E, and the constitutional protection afforded to dignity and person of freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not commenced without that minimum of evidence so too should it cease when the evidence finally falls below that threshold that will be pre-eminently be so where the prosecution has exhausted the evidence and the conviction is no longer possible except by self-incrimination."

[56] In *May v Union Government* 1954 (3) SA 121 (N) it was held that a prosecutor's function is not merely to have the matter placed on the roll to then simply be postponed for further investigation. A prosecutor must pay attention to the contents of his docket. A prosecutor must act with objectivity and must protect the public interest.

[57] In *Minister of Justice and Constitutional Development v Moleko* (2008) ZASCA 43 [2008] 3 All SA at 47 (SCA) at para [8] it was held:

“Claim for malicious prosecution requirements:

[8] In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove –

8.1 That the defendant set the law in motion (instigated or instituted the proceedings);

8.2 That the defendant acted without reasonable and probable cause;

8.3 That the defendant acted with malice (or animus iniuriandi), and

8.4 That the prosecution has failed (in this case of course Mr Moleko was acquitted at the end of the criminal trial and requirement (d) need detain as no further).

[11] With regard to the liability of the police, the question is whether they did anything more than one would expect from a police officer in the circumstances, to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not.”

[58] In *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) it was held:

“[12] as explained by Harms DP in *Sekhoto* the relevant decision is no longer than of the police but of the Court. But before the Court’s decision comes the decision of the prosecutor to charge each accused. Mr Pretorius was the prosecutor, he studied information furnished to him by the police and decided to proceed against all the accused, including both plaintiffs ... in my

view the role of the prosecutor in charging suspects is an important one. The first plaintiff was nothing other than an innocent bystander but after arrest he was in the hands of the authorities, he was reliant upon them to assess the evidence against him objectively and competently. His liberty was at stake. If the decision went against him, he was then in the hands of the Court in the sense that the liberty could only be recovered by way of a bail application. He was therefore reliant on Mr Pretorius to conscientiously apply his mind to the docket.”

[59] In *Woji v Minister of Police* (24) ZASCA 108, 2015 (1) SACR 409 (SCA) referred to with approval by the Constitutional Court in *Mahlangu and Another v Minister of Police* (CCT 88/20) (2021) ZACC 10, 2021 (7) BCLR 698 (CC), 2021 (2) SACR 595 (CC), the Supreme Court of Appeal dealt with the liability arising out of such influence and held that the Minister was liable for post-appearance detention where the wrongful and culpable conduct of the police materially influenced the decision of the Court to remand the person in question in custody. Its reasoning effectively means that it is immaterial whether the unlawful conduct of the police is exerted directly or through the prosecutor.

[60] In *S v Mahlangu supra* the Constitutional Court held that although the lawfulness or otherwise of a Court order for an arrested person’s judicial detention depends primarily on the conduct of the prosecutor and/or Magistrate, the police can incur liability for damages for detained persons being denied their freedom after their appearance before a Court, notwithstanding the Court having ordered such detention. It is the police officer’s duty to apply his/her mind to the circumstances relating to a person’s detention including applying his/her mind to the question whether detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor in venturing the Magistrate to have an informed decision whether or not there is any legal justification for the further detention of the person

[61] In *Bolekwa Nokeke v Minister of Safety and Security and Anther* (case number 1089/07) *Eastern Cape Transkei judgment*, delivered on 9 May 2008 where Plaskett, J said at paragraphs [88] and [94]:

“[88] Section 39(3) does not purport to render detentions that follow unlawful arrests valid. Instead, it operates from the presupposition that the arrest will be valid. Understood in this way, it means that if a person is lawfully arrested that person will then be in lawful custody until he/she is lawfully discharged or released. The converse holds true as well, if the arrest of the person is unlawful his/her subsequent detention will also be unlawful.”

[62] In *Masilela v Leonard Dingler (Pty) Ltd* 2004 (25) ILJ 24 (LC), it was held that:

“[28] ... it is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly, if the Court is to be asked to disbelieve a witness he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit.”

[63] In *Small v Smith* 1954 (3) SA 434 (SWA), Claasen J said at [438]:

“... it is grossly unfair and improper to let a witness’ evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.”

[64] In *the President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), it was held that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in *Brown v Dunn* and has been adopted and consistently followed by our Courts.

[65] In *Knoxmani v Minister of Police and Another* (123/2017) [2020] ZAECHC 27 (13 October 2020), the Court held as follows:

“[132] With regard to the claim of malicious prosecution, the plaintiff bears the onus to allege and prove that the defendants, (through the persons of Mnonopi and the prosecutors involved) instigated the proceedings that in doing so they had no reasonable and probable cause, that they acted *animo iniuriandi*, and that the prosecution failed (69) the first and last elements of this cause of action are not in contention.

[133] Reasonable and probable cause in the context of this claim means ‘an honest belief founded on reasonable grounds that the institution of proceedings is justified’ (70) the concept, as stated in *Relyant Trading (Pty) Ltd v Shongwe*, (71) involves a subjective and an objective component: the requirement for malicious arrest and prosecution that the arrest and prosecution be instituted ‘in the absence of reasonable and probable cause’ was explained in *Beckenstrater v Rottcher and Theunissen* (1955) 1 SA 129 (A) at 136 A – B as follows:

‘when it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that it did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged, if, despite his having such information, the defendant is shown not to have believed in the plaintiff’s guilt, a subjective element comes into play and this proves the existence, for the defendant, of reasonable probable cause. It follows that a defendant will not be liable if he/she had a genuine belief founded on reasonable grounds in the plaintiff’s guilt. Where reasonable and probable cause for an arrest or prosecution exists the conduct of the defendant instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one: “For it is of

importance to the community that persons who have reasonable and probable cause for prosecution shall not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even in so doing they are actuated by indirect and improper motives.”

[145] *In my view no reasonable and probable cause existed for the police to charge the plaintiff with robbery with aggravating circumstances on the basis that he was complicit with the two perpetrators who Skenjana described in his statement. At best there might have been a reasonable basis to charge him with a contravention of Section 36 of the General Law Amendment Act no. 62 of 1955, since his vehicle was found in compromising circumstances in relative proximity to the stolen cigarettes, assuming an interrogation into its reasons for being ‘in possession’ of this stash.*

[146] *I believe that Mnonopi must at the very least have foreseen the possibility that he was acting wrongfully by persisting with the prosecution on the charge of robbery with aggravating circumstances on the supposed premise (not evidence) of a syndicate (which would necessarily entail that it would be difficult for the plaintiff to be released on bail and that he would as a result continue to be detained pending the trial) but nevertheless continue to act reckless as to the consequences of his conduct and the pecuniary harm to the plaintiff, thus establishing the necessary element of intent.*

[147] *The same applies to the prosecutors. Both would have been expected to have regard to the contents of the docket and to have applied their minds diligently to the question whether there was a reasonable cause for the prosecution and the minimum of evidence on which to mount such prosecution.*
(74)

[148] *In Singatha and Another v Minister of Police and Another (75) the*

Court emphasized the special role of a public prosecutor in prosecutions to act with professional integrity:

‘With regard to the role of the prosecutor, the plaintiff’s placed reliance on the decision in Minister of Police and Another v Du Plessis where it was held that the prosecutor may not act arbitrarily. He must act with objectivity and in the public interest. This means that ‘a prosecutor’s function is not merely to have the matter placed on the roll to then simply be postponed for further investigation. A prosecutor must pay attention to the contents of his docket. As set out above, a prosecutor must act with objectivity and must protect the public interest. In the present case that was not done.’ A prosecutor occupies a special position in relation to the Court and his paramount duty is to assist the Court in ascertaining the truth. In doing so he plays a vital role ensuring due process and the role of law as well as respect for the rights of all parties involved in the criminal justice system.

[149] *In Minister of Police v Du Plessis (76) the Court had especially focused on the prosecutor’s obligation to exercise a discretion on the basis of the information before him/her and the critical position in which that person stands at the commencement of a prosecution: ‘[28] once an arrestee is brought before Court, in terms of s 50 of the Criminal Procedure Act 51 of 1977 (CPA), the police authority to detain, inherent in the power of arrest, is exhausted. In this regard see Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) at para [42]. As pointed out by Campbell, AJ in the Court below before the Court makes a decision on continued detention of an arrested person comes the decision of the prosecutor to charge such a person. A prosecutor has a duty not to act arbitrarily. [77] A prosecutor must act with objectivity and must protect the public interest [78] ...*

[150] *In this instance not only was there a lack of the required objectivity*

on the part of the prosecutors in carefully assessing the strength of the State's case and its prospects of success in the prosecution, but Ngxokolo plainly made himself guilty of putting a spin on that case that did not exist and could not be reconciled with the contents of the docket. Whether he was taken in by what Du Preez averred in his statement concerning the complainants supposed pointing out of the plaintiff or not, we ought to be mindful of the fact that Skenjana in his statement did not implicate the plaintiff at all. Further, he should have been aware that it was dangerous to read into Maqidlana's statement the suggestion that he had earlier seen the plaintiff's vehicle in compromising circumstances following the transporter whilst it was evidently being driven by a man other than Skenjana who he was expecting, wearing a mask and speeding by. Both he and Lande who should have made his own assessment of the strength of the State's case prior to proceeding on trial, should also in my view have foreseen the possibility that they were acting wrongfully by pursuing the prosecution with vigour (thus prolonging the plaintiff's detention for as long as the prosecution endured) whereas the statement in the docket were in conflict and the person best placed to identify, the perpetrators as being involved in robbery had not implicated him, but nevertheless continued to act, reckless as to the consequences of their conduct.

[151] this outcome is however just another incident of the pleaded absence of reasonable and probable cause to have charged the plaintiff for robbery with aggravating circumstances. It simply added to the inevitable position of the plaintiff that, pending the determination of the impugned proceedings, he would have to, and did, remain in detention for a lengthy period.

[152] In the premises I am satisfied that the plaintiff has discharged the onus resting on him to prove his claim of malicious prosecution against both defendants who are liable to pay jointly and severally for damages suffered in respect of contumelia.

[153] *In respect of the issue of damages, firstly in respect of the separate claim for unlawful detention, the plaintiff was detained for a period of three days and a few hours. Mr Kalimashe submitted that an award of R100 000.00 was adequate solatium for such deprivation of his liberty consistent with comparative awards. Such an assertion cannot be faulted.*

[155] *In respect of the plaintiff's unlawful detention from the period 25 May 2015 when he first appeared before the Reception Court up to where he was released subsequent to his acquittal on 20 December 2016, (80) Mr Kalimashe submitted, without any demur from Mr Frans that a reasonable award of damages was in the sum of R900 000.00. He submitted that the plaintiff's detention must have brought unbearable hardship to him and entailed his separation from his family even over the Christmas period in 2015. I cannot disagree. The period of detention was considerably long to have had a hugely deleterious impact upon his life and sense of well-being.*

[156] *As for the malicious prosecution claimed, Mr Kalimashe submitted that an amount of R500 000.00 was adequate compensation. I agree that this is not an unreasonable award and that it fairly represents the impairment of his reputation and sense of self-worth.*

[157] *Although the claim for malicious prosecution is brought against defendants alleged to have acted in concert (although not prayed for jointly and severally in the particulars of claim). It is clear from the evidence and Mr Kalimashe's closing submissions that the premise for this claim is that Mnonopi and the prosecutor both made themselves guilty of their own separate conduct with which to a different effect contributed causally to the continued detention of the plaintiff after his arrest pending the finalization of the criminal trial (in turn causing the personality impairment)."*

[66] *In Rahim v the Minister of Home Affairs 2015 (4) SA 433 (SCA) at para [27]*

the Court stated:

“The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the Court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve, a plaintiff of adducing evidence which will enable a court to make to make an appropriate and fair reward. In cases involving deprivation of liberty the amount of satisfaction is calculated by the Court ex aequo et bono. Inter alia the following factors are relevant:

- (i) Circumstances on a wish to deprivation of liberty took place;*
- (ii) The conduct of the defendants;*
- (iii) The nature and duration of the deprivation.”*

[67] In *Msongelwa v Minister of Police 2020 (2) SACR 664 ECM* the Plaintiff spent 158 days in custody. He was also shot during his arrest. He was awarded a sum of R5 million.

EVALUATION:

[68] After considering the evidence and the case law stated herein, I came to the findings as set out below.

[69] Mr Ndaba, with specific reference to evidence as outlined herein, did not apply his discretion. On Mr Ndaba's own version he had to arrest the Plaintiff and he did not have any other discretion as suspects sometimes run away. The manner of investigation raises further concern. The suspects were arrested without any opportunity to provide an explanation. Mr Ndaba testified that he only allows for an

explanation after arrest at the holding cells. This version correlates with the Plaintiff's testimony that he was instructed not to speak after his arrest whilst being driven in the police "bakkie".

[70] There are also administrative issues pertaining to the docket, a duplication of numbers on evidence, versions of suspects not recorded, and apparent late entries in the docket. Mr Ndaba without sound reasons did not apply for a warrant. No further investigation was conducted to link the Plaintiff to the alleged offence from the Plaintiff's first appearance in Court up until his discharge, despite numerous postponements for further investigation and the criminal trial proceeding for two (2) years.

[71] Mr Motaung's version was not disputed in cross-examination. Furthermore, no version of the Defendants disputing his evidence was put to him.

[72] Mr Ndaba's evidence was that the Plaintiff was a person of interest because, he was a part of a group that assaulted the deceased that is why he arrested him. The latter supports the fact that the Plaintiff was arrested simply for being a part of the group.

[73] In my view there was no evidence to link the Plaintiff to the death of the deceased. Furthermore, despite being informed of the identity of Mr Tseka who stabbed the deceased and despite being informed of the Plaintiff's version, which Mr Ndaba did not regard as important, Mr Ndaba persisted with the charge of murder and opposed the bail application.

[74] Mr Ndaba opposed the Plaintiff's bail application for the reason as set out herein that "*there might be other suspects and the community was waiting for him*". Mr Ndaba was referred to the bail information form where he opposed the bail. He on his own version confirmed that the Plaintiff had a fixed address, that he was easy to trace, that he did not evade arrest, that he was cooperative with the police, that he was no danger to the community and that he will not interfere with witnesses, but despite the

latter he still proceeded to oppose bail. Importantly Mr Ndaba conceded he knew that based upon his recommendations to oppose bail the Plaintiff could be incarcerated.

[75] In my view Mr Ndaba did not form a reasonable suspicion that the Plaintiff committed the offence of murder. Mr Ndaba on his own version arrested the Plaintiff without affording the Plaintiff an opportunity to proffer an explanation. Mr Ndaba testified that once a complaint is made, he must arrest. He therefore did not apply any discretion and did not consider any alternatives other than to arrest. Mr Ndaba confirmed that he did not record the Plaintiff's version and opposed the bail and that he could not recall if he informed the prosecutor of the Plaintiff's version. Mr Ndaba further conceded that he knew that the Plaintiff could be incarcerated if bail is opposed.

[76] Importantly it was not disputed that Mr Motaung informed the members of the First Defendant that the Plaintiff was not involved in any assault or murder on the deceased. Furthermore, no version to the contrary of the Defendants' witnesses were put to the Plaintiff.

[77] The only conclusion that can be drawn from the evidence before me is that the Plaintiff's arrest and subsequent detention was unlawful. The First Defendant has not overcome its onus proving justification for the arrest and detention and has not shown compliance with the jurisdictional requirements. As stated herein it has been conceded that Mr Ndaba knew the Plaintiff's bail could be refused based upon his opposition. The First Defendant is liable to compensate the Plaintiff for damages suffered as a result of his unlawful arrest and detention up until his release after the Section 174 discharge.

[78] No evidence was presented by the Defendants of any of the District Court prosecutors, neither from the prosecutor attending to the first appearance nor from the prosecutor attending the opposition of bail, up until the transfer of the matter to the Regional Court. There is thus no evidence before me to justify the institution and continuation of the prosecution or opposition to the bail proceedings. No explanation was proffered from the prosecutor who attended to the bail proceedings as to what

transpired and why the State closed its case without calling any evidence. There is thus no evidence before me to justify the bail being opposed. Mrs Maponya testified that she received the docket from the control prosecutor Mr Mutyaba on the 16th of May 2018. She read the docket and satisfied herself with the content. She testified she formed a *prima facie* view to place the matter on the roll. The matter was placed on the roll prior to consultation with Mr Motaung. It is evident that a *prima facie* view was formed solely on the statement of Mr Motaung, wherein Mr Tseka is identified as the person who stabbed the deceased

[79] Mr Mutyaba could not dispute Mr Motaung's version that he informed the prosecutor from the inception that the Plaintiff was not involved in the alleged assault or murder. In my view and according to the evidence before Court Mr Makanya's decision to continue with the prosecution was based solely upon the statement of Mr Motaung. Mr Makanya's confirmed that no further evidence was presented in almost two (2) years duration of the criminal trial that could link the Plaintiff to the alleged offences. It is once again emphasized that Mr Motaung's version was uncontested, and no version was put to Mr Motaung disputing as to what he testified by informing the police and prosecutors on various occasions of the Plaintiff's non-involvement.

[80] When explaining the reason for the long delays in protracted bail Mr Makanya referred to the notes of the presiding magistrate. He however, had no personal knowledge of the delays as he was not involved as the prosecutor presenting the State's case in Court. He was only responsible for deciding what the charge was and whether bail should be opposed. Therefore, no evidence was presented to justify the continued postponements for further investigation and delays in finalizing the bail proceedings in criminal trial.

[81] There was no evidence linking the Plaintiff to the murder. A provisional charge of murder with common purpose was not introduced, only murder. On Mr Makanya's own version he apparently only consulted with Mr Motaung approximately eight (8) months after the prosecution was initialized and after the bail application was

opposed by the Defendants. Mr Motaung's statement unequivocally identifies Mr Tseka as the person who stabbed the deceased.

[82] Mr Mutyaba attempted to place the blame of the delay in the proceedings at the doorstep of the judiciary. This was, however, not the Defendant's pleaded defence and was never put to any of the Plaintiff's witnesses. Mr Mutyaba had no personal knowledge of the numerous postponements and delays. He also stated that the judiciary determines whether bail should be granted or refused. It is however, evident that no evidence was tendered to the Magistrate of the Plaintiff's denial of being involved which was within Mr Ndaba's knowledge and no evidence was presented from the State's sole witness who was available.

[83] Mrs Maponya testified that Mr Motaung apparently confirmed the correctness of his statement. This evidence was however not put to Mr Motaung who testified repeatedly that he informed the police, prosecutor, and the Court that the Plaintiff was not involved. Mr Motaung's version was not disputed, and no version of the Defendants' witnesses was put to him. This issue was left unchallenged in cross-examination, therefor Plaintiff is entitled to assume that his and Mr Motaung's unchallenged testimony is accepted as correct. Mr Motaung's version that the Plaintiff was not involved in the assault or stabbing was given to the members of the Second Defendant and was also his evidence in the bail proceedings. Mrs Maponya confirmed that Mr Motaung testified in the criminal proceedings as per his version that the Plaintiff was not involved. In my view Mr Motaung's version is to be accepted as true.

[84] No further factual evidence was obtained regarding the circumstances of the murder. It was undisputed that Mr Motaung informed the prosecutor of the innocence of the Plaintiff. In the Section 174 application the prosecutor informed the Court of the two (2) years of prosecution that *"Your Worship the State indeed I went through the evidence and at this stage I do confirm that with regard to accused 1, it is said that he was at the scene but at this stage there is no evidence of his participation to the commission of the offence."*

[85] Considering the content of Mr Motaung's statement, the absence of further information, as well as the uncontested evidence of Mr Motaung whereby the Plaintiff was exonerated, there was no basis to proceed with the prosecution. In my view the prosecutor did not have such information as would lead a reasonable man to conclude that the Plaintiff had probably been guilty of the offence as charged.

[86] It is highlighted that Plaintiff's evidence that he was refused bail is common cause. The fact that the bail application was heard and refused is not in dispute.

[87] In considering the case law referred to in this Judgment, the fact that Mr Motaung's version was not contested, the absence of evidence implicating the Plaintiff, the manner of the investigations and arrest, the fact that bail was opposed and also opposed without the prosecutor presenting evidence, the unreasonable delays, the absence of evidence from the prosecutors involved in the District Court, the fact that the Plaintiff's version was not conveyed to the prosecutors, the fact that the prosecutors testified that Plaintiff's version was irrelevant in reaching their decision to prosecute, the fact that Mr Motaung testified in the Criminal Court as per his version throughout, even leading to the successful prosecution of Mr Tseka and the fact that Ms Maponya agreed to the Section 174 discharge application stating that there is no evidence that the Plaintiff was involved other than being at the scene, I find that the probabilities favour the Plaintiff's version and that the subsequent continued detention and prosecution was thus unlawful. The members of the Defendants had no probable cause to institute and proceed with the Plaintiff's prosecution on the charge of murder. They in fact had direct evidence available to the contrary to prosecute Mr Tseka.

[88] A reasonable person could not have led to conclude that the Plaintiff was probably guilty of the offence as charged. A reasonable person could not

have held a genuine belief founded on reasonable grounds in the Plaintiff's guilt. I am of the view that the Plaintiff has proven malice and *animus iniuriandi*. The Plaintiff was simply prosecuted because he was identified as per Mr Motaung's statement as being

part of a group, where the deceased was assaulted and stabbed. Mr Tseka was identified from the onset and no charge of assault, was ever laid against the Plaintiff.

[89] No reasonable and probable cause existed for the police to charge the Plaintiff with murder not even on the basis that he acted in furtherance of a common purpose. The investigating officer and prosecutors should have foreseen a possibility that they were acting wrongfully by persisting with the prosecution on the charge of murder on the supposed premise (not evidence) of common purpose, but nevertheless continued to act reckless as to the consequences of their conduct and the pecuniary harm to the Plaintiff thus establishing the necessary element of intent. It is expected that the members of the Defendants would have regard to the contents of the docket and applied their minds diligently to the question whether there was reasonable cause for the prosecution and the minimum of evidence which to mount such prosecution.

[90] The First and Second Defendant is thus to be held vicariously liable for the conduct of its members acting during the course and scope of their employment.

[91] The Plaintiff testified regarding the period of his detention as well as the circumstances. There is no need to reiterate same here. In my view the awards as set out in the order that follows are the appropriate awards in the circumstances of this matter.

ORDER:

[92] In the result I grant the following orders against the First and Second Defendant jointly and severally, the one paying the other to be absolved:

1. Payment of the amount of R 60 000 (Sixty Thousand Rand) in respect of the Plaintiff's unlawful arrest which occurred on the 3rd of August 2017 and subsequent detention until the 5th of August 2017.
2. Payment of the amount of R1 000 000.00 (One Million Rand) as a

result of the Plaintiff's continued unlawful detention on the 5th of August 2017 up until the 13th August 2019.

3. Payment of the amount of R500 000 (Five Hundred Thousand Rand) in respect of the Plaintiff's claim for malicious prosecution.
4. Cost of the suit.

DE KOCK, AJ

Appearance on behalf of the Plaintiff:

Attorney: - Loubser van Wyk Incorporated.

Counsel: - Advocate Van Eeden

Appearance on behalf of the First and Second Defendants:

Counsel for First and Second Defendants:

Attorney: - The Office of the State Attorney, Bloemfontein.

Counsel: - Advocate S Motlounq.